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**ASSIGNMENT:**

1. STATE CLEARLY THE PROCEDURE FROM ARRAIGNMENT TO IMPOSITION OF SENTENCE IN A CRIMINAL TRIAL IN THE HIGH COURT. COMMENT ON THE REMEDY AVAILABLE TO THE ACCUSED AFTER THE IMPOSITION OF SENTENCE.
2. COMMENT ON THE VARIOUS METHODS BY WHICH CIVIL PROCEEDINGS MAY BE COMMENCED IN THE HIGH COURT.

**QUESTION 1**

**INTRODUCTION**

The High Court has a comprehensive criminal procedure which fairly represents criminal procedure at the High Court level. Although the Criminal Procedure Act applies to the Court of Appeal and the Supreme Court yet the criminal procedure of these courts are not the same with the High Courts, as these two superior courts are not courts of first instance, or courts with original jurisdictions in criminal matters. They only hear appeals, during which time the trial procedure is of course not repeated all over. They only hear the arguments of counsel, in line with the briefs of argument they have filed and at the conclusion of which the court delivers its judgment.

**WHAT IS A CRIMINAL PROCEDURE?**

Criminal procedure is the method or procedure of commencing, conducting, and concluding criminal proceedings or matters in court.

**CRIMINAL PROCEDURE AT A HIGH COURT**

A trial or indictment or information in a High Court is really an elaboration or amplification of a summary trial at the magistrate court. In its pure essence, it is not much different from a summary trial, except for the elaboration of certain procedures. We shall look at the following salient stages of criminal procedure at a High Court:

1. What is an indictment or information?
2. Proofs of Evidence
3. Arraignment and plea
4. Plea of guilty
5. Plea of not guilty
6. Prosecution
7. Submission of ‘No case to answer’
8. Defence
9. Closing Address
10. Judgement
11. Discharge
12. Finding of guilt and sentence

**WHAT IS AN INDICTMENT OR INFORMATION?**

An indictment or information is an accusation of crime brought against an accused for trial in a High Court. An indictment or information, is a criminal charge brought against a person by the Attorney-General or any of his subordinate legal officers on behalf of the State or country and which is for trial at the High Court.

**PROOFS OF EVIDENCE**

The proofs of evidence or evidence in proof means the names, addresses and written statements of the witnesses, that the prosecution wishes to call and the list of exhibits, if any, that the prosecution wishes to put in evidence at the trial. Photocopies of the list of the witnesses, the written statements they made to the police and the list of exhibits, if any, are usually attached to the information filed by the State. The real essence of attaching these proofs of evidence is to put the accused on notice as to the nature of the case against him, enable him take steps to prepare and state his defence. This is a fundamental right under the fair hearing provisions of the Nigerian Constitution.

**ARRAIGNMENT AND PLEA**

Arraignment is the calling of an accused person formally before the court by name at the beginning of a criminal proceedings, to read to him the indictment or information brought against him and to ask him whether he pleads guilty or not guilty. In other words, arraignment means, the registrar or other officer of court calling the accused by name while the accused is standing in the dock and reading over and explaining the charge or information to the accused in a satisfactory way and asking the accused to make his plea thereto instantly. This is called the arraignment of a person before a court.

An accused person may plead as follows:

1. Autrefois acquit: *Autrefois acquit* means a plea that he has been tried for the same offence before and has been acquitted. This plea is an application of the rule against double jeopardy, which states that a person cannot be tried twice for the same offence. It is a fundamental right under the fair hearing provisions of the Nigerian Constitution.
2. Autrefois convict: *Autrefois convict* means a plea that he has been tried and convicted for the same offence on a previous occasion. He cannot be tried again. This is also an application of the rule against double jeopardy.
3. He may stand mute: where an accused stands mute, that is , without saying anything, a plea of not guilty is usually entered for the accused. This is so because the law provides that where an accused stands mute, a plea of not guilty has to be mandatorily recorded for him by the court.
4. Plea of guilty to a lesser offence: However, while intending to plead ‘not guilty’ to the offence charged, an accused person may pklead guilty to a lesser offence which is not on the information. Where this plea is accepted by the prosecution, the court may pass its sentence accordingly. Here the prosecution usually drops the instant charge. Thus, paving the way for the court to sentence the accused for the lesser offence admitted. Thus, there is room for plea bargain.
5. He may plead guilty to the offence charged
6. He may plead not guilty

**PLEA OF GUILTY**

Where an accused person pleads guilty, the counsel for the prosecution will give the court a summary of the evidence together with details of the accused person’s background, that is, character and his criminal record, if any. After this tyhe counsel for the defense usually makes his allocutus or plea in mitigation of sentence and the court then passes its sentences.

**PLEA OF NOT GUILTY**

Where an accused person pleads not guilty, the trial then proceeds.

**PLEA BARGAINING**

Plea bargaining or plea negotiation is negotiating and agreeing for an accused to plead guilty to a lesser crime, in exchange for the dismissal of the serious criminal charge brought against him and for a quick disposal of the entire criminal proceedings. The concept of bargaining began in western countries, and it is common there, especially in the United States of America. The idea of plea bargain is not new to the Nigerian Legal System as the criminal procedure laws have provision for an accused to plead guilty to a lesser offence instead of the more serious offence brought against him. Accordingly, in recent years, there have been plea bargaining in a number of cases, especially in criminal charges brought by the Economic and Financial Crimes Commission [EFCC] in order to expeditiously dispose of the potentially lengthy criminal proceedings. Thus, an accused person who does not intend to plead guilty to the serious offence charged may plead guilty to a lesser offence, which is not on the indictment or information. This plea or change of pleas is usually as a result of a bargain reached between the defence counsel and the counsel for the prosecution often with the judge’s approval. The accused is then sentenced in respect of this lesser offence. This transaction or procedure is called ‘plea bargaining.’ However, where the prosecution fails to reach an agreement with the defence and therefore refuses to accept the plea to a lesser offence, then the trial proceeds and the accused person as a rule of law cannot be sentenced on the basis of his plea of guilty to the lesser offence. This is so for the plea to the lesser offence is regarded as withdrawn, if it is not accepted by the prosecution. A trial judge may also allow an accused person to change his plea, from guilty to not guilty, and thus avoid the passing of sentence thereon, otherwise a refusal to allow a change of plea at that point in time usually becomes an issue of appeal. Where an accused changes his plea from guilty to not guilty, the trial then proceeds.

**MENTALLY ILL PERSONS**

Some accused persons may be too mentally ill or disordered to make a plea to a criminal charge. This is usually referred to as ‘unfitness to plead’. Such accused person may then be referred for psychiatric examination and treatment. In a proven or clear case of murder, if the accused is unfit to make a plea by reason of insanity, a variety of hospital and guardianship orders may be made and the accused may be committed to a mental or psychiatric hospital for necessary care at the pleasure of the President or Governor in respect of federal or state offence, as the case may be until the person is mentally fit to be released.

Alternatively, the defence may put up the defence of insanity and if successful, the accused is usually acquitted on ground of insanity. The leading case on insanity is **R v M’Naghten**. In this case, the accused person was charged with murder. A plea or defence of insanity was successfully made for the accused and the House of Lords held: that the accused was not guilty and was acquitted on the ground of insanity.

As a general rule of law, every accused person is presumed to be sane until the contrary is proved. It is usually the duty or right of the defence to raise the issue of insanity, however, in obvious cases, a trial judge may raise it *suo motu*, that is, of its own motion, the prosecution may inform court of it. The fact of insanity is usually proved, that is, established by the defence leading evidence on the balance of probability. Thus, the issue of insanity is a matter of fact to be decided by court and it is usually established by evidence of relevant witnesses , including medical evidence.

**PROSECUTION**

The counsel for the prosecution always opens a criminal proceedings by calling evidence for the prosecution. He calls his witnesses and examines each in chief, and tenders any exhibit they may have. The witnesses are in turn cross-examined by the defence counsel and re-examined by the prosecuting counsel as may be necessary and the case for the prosecution closes. The burden of proof on the prosecution in criminal proceedings is proof beyond reasonable doubt. Where the burden of proof is not discharged, the charge or information is usually dismissed and the accused is legally entitled to be set free and is accordingly usually discharged and acquitted. This burden of proof which rests on the prosecution to prove the guilt of the accused beyond reasonable doubt is never lowered or watered down. This is for, for it is better for a guilty person to go scot-free and escape justice, than for an innocent person to be unjustly punished, due to a lowered standard of proof. The principle or requirement that the guilt of an accused be proved beyond reasonable doubt has its root deep in Roman Law. The Romans had it as a maxim that it is better for a guilty person to go unpunished than for an innocent person to be condemned. The requirement of proof beyond reasonable doubt has spread to all parts of the world. Stressing the need for the prosecution to discharge the burden of proof required by law in criminal proceedings

**SUBMISSION OF ‘NO CASE TO ANSWER’**

At the close of the case for the prosecution, the defence counsel may submit that the prosecution has not produced sufficient evidence or made out a *prima facie* case against the accused and consequently, the accused has no case to answer and therefore the case should not proceed further. The defence counsel makes the submission by addressing the court. The prosecuting counsel usually replies. The judge then makes a ruling on this submission..

The judge may accept the submission and make a ruling that the accused has no case to answer. This ruling is a verdict of not guilty and the court may thereupon discharge and acquit the accused on merit, or discharge but not acquit the accused, if the submission succeeded just on a technicality and not on merit.

However, where the judge rejects the no case submission, in his ruling, the trial proceeds an the accused has to state his case by giving evidence in his defence. Where the accused refuses to give evidence in his defence and chooses to stand by his ‘No case Submission,’ which had earlier failed, the court would often usually convict the accused. The reason being that the accused failed to defend himself against a *prima facie* case made out against him.

**DEFENCE**

After the close of the case for the prosecution and the failure of a no case submission, if such submission was made, the case for the defence then opens. The accused and his witnesses, if any, are, one after the other, led in evidence-in-chief by the counsel for the defence and are cross-examined by the prosecuting counsel and re-examined for the defence as may be necessary. Each witness undergoes the whole process, before another witness is called. It is never mixed up. This is always the procedure. Generally, unless a witness has finished his testimony and undergone necessary cross-examination and re-examination, if any, another witness may not be called, except there are good reasons to do so. Some good reasons to call a witness out of turn, include the need to take the evidence of a witness who is obviously very busy or who may not be readily available to testify, or who lives in a distant town or place, or who is suffering from ill-health, travelling to a far place, and so forth. After the witnesses for the defence have testified and tendered any exhibit they may have, the case for the defence closes.

**CLOSING ADDRESSES**

After the close of the case for the defence, the counsel for both sides then make closing speeches by addressing the court from their filed written addresses. The prosecution counsel is always the first to address the court. He sums up or reviews the case on both sides.

He points out the strength of the case for the prosecution and identifies the weaknesses if any of the defence and then urges the court to convict the accused as charged. However, the general rule of law is that the case for the prosecution must succeed on its own. This is so, for in criminal proceedings the burden of proof on the prosecution is proof beyond reasonable doubt. The case for the persecution must succeed on its own strength. Thus the case for the prosecution cannot rely on the weakness of the defence to succeed. For this reason an accused person is not bound to put up a defence and may in appropriate circumstances rest his case or defence on the case for the prosecution. Next, the counsel for the defence addresses the court. In his address he points out the weaknesses of the case for the prosecution. If the case for the prosecution is a pack of lies and a mere fabrication, conjecture, imagination, malicious, frivolous, vexations and an abuse of court process, he calls it so. If a *prima facie* case has not been made out, or sufficient evidence has not been adduced as required by law to discharge the burden of proof that rest on the prosecution in criminal proceedings, which is proof beyond reasonable doubt, he points it out to the court and finally, he urges the court to discharge and acquit the accused on the charge or charges, as the case may be. The general rule of closing speeches, is that the accused or his counsel is entitled to the last word, that is, it is his right to round off the addresses.

**JUDGEMENT**

After the closing addresses by counsel for both sides, the judge fixes the judgement for a date provided that it is not a summary trial, and the court rises in adjournment to enable it deliberate, consider, or evaluate the totality of evidence in the case. On the adjourned date the court resumes sitting, the case is called and the judge begins to deliver his judgment on the case. However, where a trial is by summary procedure the judge may deliver judgement there and then, or he may retire to his chamber to consider judgement and resume sitting to deliver it on that same day, as the case may be, or on an adjourned date.

In the judgment, the judge sums up, weighs, or reviews the evidence for both sides. He states his reasons for believing and accepting the case for either side and also gives his reason for disbelieving and rejecting the evidence for the other side. In conclusion, the judge may find the accused not guilty or guilty as the case may be. This must be done according to law.

**DISCHARGE**

When an accused person has not been found guilty. on merit, the judge will dismiss the information or charges and accordingly discharge and acquit the accused person as provided under the criminal procedure law. On the other hand, if the prosecution failed on a technicality, then the court will usually discharge the accused, but not acquit him.

Where a person has not been found guilty, a court usually makes one or more of the following order:

1. Dismissal order; dismissing the information, or charge[s]
2. Order of discharge of the accused on the charge[s]
3. Order of acquittal; and
4. Order of compensation, as the case may be for the false, frivolous, vexatious or malicious prosecution or false imprisonment of the accused, and so forth as may be relevant according to the circumstances of the case.

**SENTENCE**

Where an accused is found guilty, before passing sentence an allocutus, plea for mercy or leniency is usually made by the counsel for the defence. After the allocutus, the judge passes sentence on the accused.

**TYPES OF SENTENCES COURT MAY IMPOSE**

When an accused has been found guilty of a crime, a court may under the Criminal Procedure Act or law pass sentence and make one or more appropriate orders as follows:

1. Imprisonment, usually with hard labour
2. Fine, in lieu of , that is, instead of imprisonment or both fine and jail
3. Death sentence;
4. Caning;
5. Importation;

Other orders a court may make include:

1. Binding over order [and suspended sentence and community service in western countries].
2. Order for detention during the pleasure of the President or Governor as the case may be;
3. Order for disposal of property;
4. Order for costs;
5. Award of damages; and
6. Probation order

Under the Child Rights Act and Laws or Children and Young Persons Law, various orders may be made in respect of a child offender by a family court as examined earlier on.

**REMEDY AVAILABLE TO THE ACCUSED AFTER THE IMPOSITION OF SENTENCE**

I wish to quote from the wisdom of his lordship Hon. Justice Belgore, where he said:

“A judge must remember that the purpose of sentencing is to protect the society as a whole from dangerous action of the prisoner, to assist as far as possible the victim of the crime, to reform the offender and prevent other people from being criminal. In applying any of these principles, the judge must be humane, not imposing a draconian punishment or an inhuman one. Concurrent and not consecutive sentences should be given. If it is a fine, it must not be excessive or out of proportion to the gravity of the total offence”.

**WHAT IS A LEGAL REMEDY?**

A **legal remedy**, also referred to as **judicial relief** or a **judicial remedy**, is the means with which a [court of law](https://en.wikipedia.org/wiki/Court_of_law), usually in the exercise of [civil law](https://en.wikipedia.org/wiki/Civil_law_(common_law)) jurisdiction, enforces a [right](https://en.wikipedia.org/wiki/Right), imposes a [penalty](https://en.wikipedia.org/wiki/Sentence_(law)), or makes another [court order](https://en.wikipedia.org/wiki/Court_order) to impose its will in order to compensate for the harm of a wrongful act inflicted upon an individual.[[1]](https://en.wikipedia.org/wiki/Legal_remedy#cite_note-:0-1)

In [common law](https://en.wikipedia.org/wiki/Common_law) jurisdictions and mixed civil-common law jurisdictions, the law of remedies distinguishes between a legal remedy (e.g. a specific amount of monetary [damages](https://en.wikipedia.org/wiki/Damages)) and an [equitable remedy](https://en.wikipedia.org/wiki/Equitable_remedy) (e.g. [injunctive relief](https://en.wikipedia.org/wiki/Injunctive_relief) or [specific performance](https://en.wikipedia.org/wiki/Specific_performance)). Another type of remedy available in these systems is [declaratory relief](https://en.wikipedia.org/wiki/Declaratory_relief), where a court determines the rights of the parties to [action](https://en.wikipedia.org/wiki/Lawsuit) without awarding damages or ordering equitable relief. The type of legal remedies to be applied in specific cases depend on the nature of the wrongful act and its liability.

There should be one comprehensive remedy for post-conviction review of the validity of judgments of conviction, or of the legality of custody or supervision based upon a judgment of conviction. The remedy should encompass all claims whether factual or legal in nature and should take primacy over any existing procedure or process for determination of such claims. The procedural characteristics of the post-conviction remedy should be appropriate to the purposes of the remedy. While the post-conviction proceeding is separate from the original prosecution proceeding, the post-conviction stage is an extension of the original proceeding and should be related to it insofar as feasible.

(a) Original proceedings to entertain applications for post-conviction relief should be vested in a trial court of general criminal jurisdiction.

(b) An action for post-conviction relief should be brought in the court in which the applicant's challenged conviction and sentence was rendered. For efficient management of a pending case, the court should be authorized in extraordinary circumstances to conduct proceedings in any place within the state. In addition, provision should be made for transfer of a case to another court if that is appropriate for the convenience of the parties or to guard against undue prejudice in the proceeding.

(c) Neither a general rule favouring nor one disfavouring submission of a post-conviction application to the same trial judge who originally presided is clearly preferable. If by rule or practice ordinary assignment to the same judge is adopted, there should be a declared policy permitting the judge freely to recuse himself or herself in a particular case, whether or not formally disqualified.

**APPELLATE COURT JURISDICTION; RIGHT TO APPEAL**

(a) Appellate review should be available through the same courts authorized to hear appeals from judgments of conviction.

(b) Appellate review of final judgments should be available as of right at the instance of the party adversely affected, whether applicant or respondent. In a three-tiered court system, the jurisdiction of the highest court may appropriately be discretionary with that court.

(c) In general, a party should not be permitted to take an appeal until a final adverse judgment has been entered in the trial court. Interlocutory review of an order denying a stay of execution of a death sentence should be authorized when necessary to prevent carrying out the sentence before final judgment in the trial court.

**RESPONSIVE PLEADING; CALENDAR PRIORITY; BAIL; STAY OF EXECUTION; JUDGMENT ON THE PLEADINGS**

(a) Prompt responsive pleadings should be required by court rule specifying the time for normal responses, with the response fully and fairly meeting the allegations of the application. Where the record of prior proceedings would aid the court in understanding the nature of the contentions, counsel for the respondent should supply the relevant portions to the extent that they were not appended to the application.

(b) In addition to making effective the requirement of prompt response by the state, if the applicants are held under sentence of death, or if there is other reason for expedition, courts should accord suitable calendar priority to the determination of applications for post-conviction relief.

(c) Courts should have the power to order executions stayed, or to release applicants on recognizance or with sufficient sureties in appropriate cases, pending final disposition of applications for post-conviction relief.

(d) In light of the application and response, the court may grant a motion for judgment on the pleadings if there exists no material issue of fact.

**QUESTION 2**

**WHAT IS CIVIL PROCEDURE?**

Civil procedure is the method, or procedure of commencing, conducting and concluding civil matters, trials, or claims in court.

**MODES OF INSITITUTING ACTION IN HIGH COURT**

There are four different ways or methods of commencing actions in the High Court. These are:

a)      By writ of summons (a writ for short);

b)      By petition;

c)      By originating summons; and

d)     By originating motion (also known as application).

Each of the above is referred to as originating process. Almost, as a general rule, it is by the writ of summons that most actions are commenced, each of the remaining originating processes being resorted to where the Rules or a statute or a rule of practice prescribes the particular process as a mode of starting specified type of actions.

**WRIT OF SUMMONS**

A writ of summons is a formal document issued by a court stating concisely the nature of the claim of a plaintiff against a defendant, the relief or remedy claimed and commanding the defendant to “cause an appearance to be entered” for him in an action at the suit of the plaintiff within a specific period of time, usually eight days, after the service of the writ on him, with a warning that, in default of his causing an appearance to be entered as commanded, the plaintiff may proceed therein and judgment may be given in defendant’s absence.

Generally, all actions are to be commenced by the writ of summons except where there is any express legislation prescribing another mode – [Order 3 Rule 1 & 2 Lagos High Court (Civil Procedure) Rules 2004;](file:///C:\Documents%20and%20Settings\me\My%20Documents\Law%20school2\text\777e60ed-1188.html#Form_and_Commencement_of_Action) [Order 1 Rule 2, Uniform Civil Procedure Rules (UCPR); and Order 4 Rule 2, Abuja.](file:///C:\Documents%20and%20Settings\me\My%20Documents\Law%20school2\text\777e60ed-1184.html#FORM_AND_COMMENCEMENT_) From the cases, writ of summons is the appropriate mode for commencing an action which by its nature is contentious. Usually, action commenced by a writ of summons requires the filing of pleadings and possibly a long trial – [*Doherty v. Doherty (1968) NMLR 241*](file:///C:\Documents%20and%20Settings\me\My%20Documents\Law%20school2\text\777e60ed-328.html)*;* [*NBN Ltd v.  Alakija [1978] ANLR 231*](file:///C:\Documents%20and%20Settings\me\My%20Documents\Law%20school2\text\alakija.htm)*.*

Under the Lagos High Court (Civil Procedure) Rules. 2004. All civil actions commenced by writ of summons shall be accompanied by:

a)      Statement of claim;

b)      List of witnesses to be called at the trial;

c)      Written statement on oath of the witnesses; and

d)     Copies of every document to be relied upon at every trial – Order 2 Rule 1, Lagos.

Where a claimant fails to comply with the above, his originating process shall not be accepted for filing by the Registry – Order 2 R. 2, Lagos. Under Order 4 R. 17 Abuja, a certificate of pre-action counseling signed by counsel and litigant shall be filled along with the writ where proceedings are initiated by counsel, showing that the parties have been appropriately advised as to the relative strength or weakness of their respective cases, and the counsel shall be personally liable to pay the costs of the proceedings where it turns out to be frivolous.

Additionally, this is used to instill action for contentious matters or matters that deal with disputes. A Writ of Summons is a formal document addressed to the defendant requiring him to enter an appearance if he wishes to dispute the plaintiff’s claim. Civil actions involving substantial disputes of fact are commenced by way of a writ. These include, but are not limited to:

1. Contract actions, e.g, claim for damages resulting from breach of contractual terms and obligations, etc;
2. Tort actions, e.g, claim for damages in respect of property damage resulting from road accidents and negligence, Claim for damages resulting from fraud and defamation, etc;
3. Personal Injury actions, e.g, claim for damages in respect of personal injury and / or death resulting from road and industrial accidents or negligence, etc;
4. Intellectual property actions, e.g, claim for damages resulting from the infringement of copyright, trademark or patent, etc;

**BY PETITION**

A petition is a written application in the nature of a pleading setting out a party’s case in detail and made in open court.

It is, however, only used where a statute or Rules of court prescribe it as such a process – Order 1 R. 2(3) UCPR. For example, *section 410(1) of Companies and allied Matters Act (CAMA) 2004* provides that *an application to the court for the winding-up of a company shall be by a petition.* Also, *section 54(1) of Matrimonial Causes Act, 1970* provides that proceedings for dissolution of marriage are commenced by petition. The Electoral Act also states that petitions are the only modes of procedure in election litigations. An election petition has been said to be similar to pleadings in civil matter as it is in that the practitioner sets out all the material facts he relies on for his petition – *Egolum v. Obasanjo (1999) 5 SCNJ 92 at 125.*

A petition as the Uniform Procedure Rules provides, shall include a concise statement of the nature of the claim made or the relief or remedy required in the proceedings begun thereby and at the end thereof a statement of the names of the persons, if any, required to be served therewith or, if no person is required to be served a statement to that effect - Order 7 R. 2(1) UCPR.

**BY ORIGINATING SUMMONS**

It is a summons that initiates proceedings. However, a summons in a pending matter does not initiate proceedings but it is used for making interlocutory applications in a pending cause or matter.

Generally, originating summons is used for non-contentious actions, that is, those actions where the facts are not likely to be in dispute (a question of law rather than disputed issues of facts). When the principal question in issue is or is likely to be one of construction of a written law or any instrument or of any deed or will or contract, originating summons may be used for the determination of such questions or construction – *Director, SSS v. Agbakoba (1999) 3 NWLR (Pt. 595) 425; NBN Ltd. v. Alakija (supra); Doherty v. Doherty (supra)*; In *Unilag v. Aigoro (1991) 3 NWLR (Pt. 179) 376*, it was held that originating summons is used where it is sought to correct errors in a judgment; In *Orianwovo v. Orianwovo (2001) 5 NWLR (Pt. 752) 548*, it was held that an action for declaration of title to land ought not to be commenced by originating summons.

In *Fagbola v. Titilayo Plastic Industries (2005) 2 NWLR (Pt. 909) 1 at 19*, it was held that where proceedings are commenced by originating summons, pleadings are not used, that is, no statement of claims or defence are filed.  Rather, affidavit evidence in support of originating summons and counter affidavit will take the place of pleadings – Order 3 R. 5 and 6 Lagos; Order 1 Rule 2(2) Abuja; and Order 1 Rule 2(2) Kano.

**ORIGINATING MOTION OR APPLICATION**

This is the last of the originating processes. Unlike a petition, this may be used where a statute has not provided for it. Originating application is used when facts are not in dispute and it is used when the action relates to the interpretation of a document. In an application for prerogative orders of certiorari, prohibition, mandamus, *Habeas Corpus* or enforcement of Fundamental Human Rights, originating motion may be used.  Significantly, where a state has not provided for a method for enforcing a right conferred by that statute, originating motion should be used – Order 40 Rule 5(1) Lagos; Order 43 Rule 5(1) Kano; and Order 42 Rule 5(1) Abuja.  It is rarely used in the Magistrate Court.

Its use was highlighted in the case of *Chike Arah Akunna v. A-G of Anambra State& Ors (1977) 5 SC 161,* it was held that the appropriate method of making an application to the court, where a statute provides that such an application may be made but does not provide for any special procedure, is an originating motion; *Fajinmi v. Speaker, Western house of Assembly (1962) 1 All NLR (Pt. 1) 206.*

This rule was also re-stated in *Kasoap v. Kofa Trading Co. (1996) 2 SCNJ 325 at 335,* that where it is sought to enforce a right conferred by a statute, but in respect of which no rules of practice and procedure exist, the proper procedure is an originating notice of motion.

**REFERENCES**

THE NIGERIAN LEGAL SYSTEM: ESE MALEMI

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